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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BYRON LINDSAY,

Defendant and Appellant.

D074730

(Super. Ct. No. SCD273595)

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed and remanded with directions.

Kent D. Young, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Byron Lindsay of robbery (Pen. Code,¹ § 211).² Lindsay later admitted the allegations that he had one prison prior (§§ 667.5, subd. (b) & 668), one serious felony prior (§§ 667, subd. (a)(1), 668, & 1192.7, subd. (c)), and one strike prior (§§ 667, 1170.12, & 668). The trial court sentenced Lindsay to an aggregate term of nine years in prison.

Lindsay appeals, contending the trial court erred by (1) failing to instruct the jury as to the lesser included offense of attempted robbery and (2) admitting evidence of his 2012 robbery conviction under Evidence Code section 1101, subdivision (b), and as impeachment evidence. He further argues that his admission of his strike priors was not intelligent and voluntary because the trial court did not advise him of his rights to confront witnesses or to remain silent. We reject these contentions and affirm the judgment.

Finally, Lindsay asks for a limited remand to allow the trial court to exercise its discretion under section 1385 to strike his section 667, subdivision (a)(1), consecutive five-year prison term pursuant to Senate Bill No. 1393. The Attorney General concedes that in light of Senate Bill No. 1393 we must remand this matter to the trial court to allow it to exercise its section 1385 discretion whether to strike Lindsay's section 667, subdivision (a)(1), enhancements. We agree that remand is appropriate.

¹ Undesignated statutory references are to the Penal Code.

² The record on appeal includes the reporter's transcripts for an earlier trial that resulted in a hung jury and mistrial. At the conclusion of that proceeding, defense counsel and the prosecutor both represented that it was the second mistrial of the matter after the first trial also resulted in a hung jury. Accordingly, the matter on appeal is the third trial of this charge.

FACTUAL BACKGROUND

On a night in August 2017 Sandy F. smoked a cigarette on the sidewalk near a trolley station. Lindsay and another man approached him. Lindsay stood in front of Sandy, while the other man went behind him. Lindsay asked Sandy for a cigarette and Sandy replied that he was homeless and barely had enough cigarettes for himself.

Lindsay replied, "yo, you're going to give me something today" and took a pistol out of his bag, pulled back the slide, and pointed it at Sandy. Lindsay repeated, "now you're going to give me something today." Sandy explained that he was homeless and had nothing to give. Lindsay then took the gun by the barrel, and positioned it in the air behind him as if to pistol-whip Sandy, repeated his demand and asked Sandy "yo, have you ever been put to sleep." Lindsay then grabbed the cigarette out of Sandy's mouth, took Sandy's hat, put it on his head and left.

Sandy called 911. A responding police officer spotted Lindsay and ordered him and his companion to the ground at gunpoint. After Lindsay's arrest, police searched his bag and found a pellet gun, which had an operational slide and appeared to be a semiautomatic handgun. Sandy and the officer that found the gun both testified that the pistol looked real.

DISCUSSION

I. ALLEGED FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSE

A. Additional Background

Lindsay testified that he had been drunk and only remembered parts of his encounter with Sandy. He remembered asking for a cigarette and claimed that Sandy gave him a hat. However, after hearing Sandy testify, Lindsay believed that Sandy was

telling the truth, and that he may have taken Sandy's cigarette and hat. Lindsay claimed that he did not intend to take the cigarette or the hat. He also stated that he did not intend to give the items back to Sandy.

Before trial, the court asked the parties if they agreed on the instructions and verdict forms provided by the court. Both parties agreed. The trial court instructed the jury as to robbery, but not as to attempted robbery.

B. *Analysis*

Lindsay contends his testimony that Sandy gave him the hat and cigarette constituted evidence of an attempted robbery and the trial court erred when it failed to instruct the jury regarding attempted robbery as a lesser included offense of robbery. The People disagree, arguing that no substantial evidence supported the instruction. We agree with the People.

A trial court has a sua sponte duty to instruct on lesser included offenses whenever substantial evidence raises a question whether all the elements of the charged offense are present. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) " '[T]he existence of "any evidence, no matter how weak," will not justify instructions on a lesser included offense' [Citation.] Such instructions are required only where there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense." (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) "When there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense." (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Substantial evidence is evidence that a

reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.)

We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Booker, supra*, 51 Cal.4th at p. 181.) The erroneous failure to instruct sua sponte on a lesser included offense in a noncapital case is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. (*People v. Breverman* (1998) 19 Cal.4th 142, 165.)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear," with the intent to permanently deprive the victim of the property. (§ 211; *People v. Anderson* (2011) 51 Cal.4th 989, 994.) Attempted robbery is a lesser included offense of robbery. (*People v. Crary* (1968) 265 Cal.App.2d 534, 540 (*Crary*).) Section 21a provides that "[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission."

Here, there is no substantial evidence showing that Lindsay only committed an attempted robbery, i.e., that he intended to commit a robbery, but failed to acquire Sandy's property. Rather, there is overwhelming evidence that if Lindsay committed any offense at all, it was robbery. First, Lindsay pointed what appeared to be a deadly weapon at Sandy and demanded Sandy's property. When Sandy resisted, Lindsay threatened to hit him with the gun as he again demanded Sandy's property. Lindsay then grabbed the cigarette out of Sandy's mouth, took Sandy's hat, put it on his head and left. Lindsay admitted that he did not intend to return the items.

Lindsay's reliance on *Crary*, *supra*, 265 Cal.App.2d 534 is misplaced because, unlike the facts here, the "bizarre" facts in *Crary* supported a finding that the crime was only an attempted robbery. (*Id.* at p. 539.) In *Crary*, the appellant and his cohort discussed robbing a gas station, with appellant suggesting that they club the attendant and then rifle the register. They armed themselves with a gun and drove to the gas station. The cohort offered the attendant a pair of pliers in exchange for money to purchase gasoline, but the attendant refused the offer. After the attendant noticed the gun and inquired about it, the appellant picked up the gun, pointed it at the attendant's chest, while mumbling something that sounded to the attendant like " 'this is a stickup' or 'this is a holdup.' " After trying "to talk the boys out of the holdup," the attendant took money out of his pocket, told the boys he would give them some gas and pumped fuel into their car. Before driving off, the cohort handed the attendant the pliers. (*Id.* at pp. 537-537.)

The Court of Appeal held this "bizarre" fact pattern supported an attempted robbery instruction because appellant initially planned to steal money from the cash register, but did not do so. (*Crary*, *supra*, 265 Cal.App.2d at p. 539.) "Thus, from these facts it would not be unreasonable for the jury to believe that the boys intended to rob the service station when appellant threatened [the attendant] with the shotgun but changed their minds after [the attendant] talked to them in a fatherly fashion[.]" (*Ibid.*) The facts also supported the reasonable conclusion that when the attendant "placed the gasoline in appellant's car he was no longer operating under fear of bodily harm and did so voluntarily, believing that he had talked the boys out of robbing the station." (*Ibid.*) The court reasoned that "if appellant and [his cohort] had changed their minds about robbing the service station when [the attendant] put the gasoline in appellant's automobile, and if

they left with the impression that they had paid for it with a pair of pliers, they did not have the felonious intent required to commit robbery. Moreover, if [the attendant] placed the gasoline in appellant's car voluntarily under the belief that he talked the boys out of robbing him, the gasoline was not taken by means of force or fear within the meaning of Penal Code section 211. But, even so, the boys would have been guilty of attempted robbery." (*Id.* at pp. 539-540.)

Unlike *Crary, supra*, 265 Cal.App.2d 534, there is no evidence that Lindsay abandoned his intent to rob Lindsay of his hat and cigarette. Lindsay's testimony that Sandy gave him the property would not support a finding of attempted robbery because Sandy only did so in response to Lindsay's threat to shoot and then pistol whip him. On this evidence, the trial court had no duty to instruct on the lesser included offense of attempted robbery.

II. ALLEGED EVIDENTIARY ERROR

A. Additional Facts

The People moved in limine to admit evidence that in 2012 Lindsay pleaded guilty of robbery to prove Lindsay's intent, motive and common plan under Evidence Code section 1101, subdivision (b). The prosecutor argued that the prior robbery was also committed at a trolley station and involved approaching and frightening the victim into giving up his property. Defense counsel disagreed, arguing that Lindsay had aided and abetted the prior robbery, and thus it differed from the charged robbery. The defense moved to exclude the prior conviction as impeachment evidence. The trial court concluded that evidence of the prior robbery was admissible to demonstrate intent and

common plan. It denied the defense motion to exclude the evidence, stating that the evidence could also be used to impeach Lindsay.

After Lindsay testified that he had not intended to take Sandy's property, the prosecutor asked him during cross-examination about his 2012 robbery conviction. Lindsay agreed that he and some other people formed a plan to commit robbery, and claimed that his role was to approach and contact the targeted victim at a trolley station. Another person asked the victim for the victim's phone to make a call. After making a call, the victim was told that he would not get the phone back as another member of the group gestured as if he was going to hit the victim. The group then left with the victim's phone. Lindsay pleaded guilty to committing a robbery. On redirect examination Lindsay testified that he pleaded guilty because he "thought that [he] was guilty."

During closing argument, the prosecutor argued that Lindsay lied during his testimony and asked the jury to consider the 2012 robbery for purposes of evaluating Lindsay's credibility as a witness.

The trial court instructed the jury with CALCRIM No. 375, regarding evidence of an uncharged offense to prove identity, intent, common plan, etc. It also instructed the jury with CALCRIM No. 303 as to the proper use of limited purpose evidence.

B. Applicable Law

Ordinarily, evidence of prior criminal acts is inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101, subd. (a).) However, Evidence Code section 1101 does not prohibit "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or

accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

Additionally, "[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." (Evid. Code, § 1101, subd. (c).) "Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used . . . for purposes of impeachment . . . in any criminal proceeding." (Cal. Const., art. I, § 28, subd. (f)(4); see also Evid. Code, § 788 [evidence that a witness has been convicted of a felony may be admitted to attack his credibility].) This provision " ' "authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty." ' " (*People v. Edwards* (2013) 57 Cal.4th 658, 723-724 (*Edwards*).) Admission of a prior felony conviction for impeachment is subject to the trial court's exercise of discretion under Evidence Code section 352. (*Edwards, supra*, at p. 723.) We review the trial court's exercise of discretion in admitting evidence under Evidence Code section 352 for abuse and will not disturb the court's ruling "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

C. Analysis

Lindsay asserts the court erred in admitting evidence of his 2012 robbery conviction under Evidence Code section 1101, subdivision (b), without first making the required preliminary findings for admissibility of this prior incident. He reasons that in the prior robbery he was an aider and abettor and the trial court erred by failing to determine his intent in the prior robbery before finding the crime relevant to prove his

intent in the charged offense, claiming that the intent to rob is different than the intent to aid and abet a robbery. Alternatively, Lindsay argues that the trial court erred in concluding, as a matter of law, that there is no distinction between accomplice and principal liability when admitting evidence of prior acts under Evidence Code section 1101. We reject both arguments.

"[O]nly relevant evidence is admissible. (Evid. Code, § 350.) Sometimes the relevance of evidence depends on the existence of a preliminary fact. (Evid. Code § 403, subd. (a),) The court should exclude the proffered evidence only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.

[Citations.] The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion." (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

"[T]he People need only establish the relevance of the 'other act' evidence by a preponderance of the evidence." (*People v. Simon* (1986) 184 Cal.App.3d 125, 132.)

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "[T]o be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbor[ed] the same intent in each instance.' " (*Ibid.*)

Here, when it ruled on the People's in limine motion, the court had sufficient evidence to make the preliminary fact determination that Lindsay harbored a similar intent for the prior robbery and the instant crime. Lindsay cited no authority which required express findings by the trial court about the preliminary fact determination. Rather "[a] ruling on the admissibility of evidence implies whatever finding of fact is

prerequisite thereto; a separate or formal finding is unnecessary unless required by statute." (Evid. Code, § 402, subd. (c).)

The fact Lindsay aided and abetted the prior robbery (rather than being the lone perpetrator) did not warrant exclusion of this evidence. Whether Lindsay harbored the same intent in both instances constituted a factual question reserved for the jury. As our high court noted, " 'It is the jury's function to determine the effect and value of the evidence addressed to it. . . . [T]he judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question.' " (*People v. Lucas, supra*, 12 Cal.4th at p. 467.) Thus, the trial court did not abuse its discretion in admitting this evidence to show Lindsay's intent.

Moreover, the trial court properly instructed the jury on the use of Lindsay's prior robbery conviction to prove intent. Namely, the court instructed the jury pursuant to CALCRIM No. 375 that it could consider the evidence of the uncharged offense to determine whether Lindsay had the intent to commit a robbery "only if the People have proved by a preponderance of the evidence that [Lindsay] in fact committed the uncharged offense. . . . [¶] If you decide that [Lindsay] committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether: [¶] The defendant acted with the intent to permanently deprive Sandy [F.]. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offense. [¶] Do not consider this evidence for any other purpose other than credibility as referenced in CALCRIM [No.] 316."

Lindsay next contends the trial court abused its discretion under Evidence Code section 352 by admitting evidence of the 2012 robbery for impeachment based on the similarity of this incident to the instant case. We disagree.

Subject to the trial court's discretion under Evidence Code section 352, a witness's prior felony convictions for crimes involving moral turpitude are admissible to impeach. (Evid. Code, § 788; *Edwards, supra*, 57 Cal.4th at pp. 723-724.) Robbery is a crime involving moral turpitude. (*People v. Brown* (1985) 169 Cal.App.3d 800, 806.) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*People v. Clark* (2011) 52 Cal.4th 856, 931.)

Accordingly, " [t]he identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion.' " (*People v. Green* (1995) 34 Cal.App.4th 165, 183.) "[A]ny felony conviction evincing moral turpitude, as here, 'has some "tendency in reason" (Evid. Code, § 210) to shake one's confidence in [a witness's] honesty.' " (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1496, fn. omitted.)

Here, the 2012 robbery conviction occurred five years before the instant crime and was not remote. The testimony regarding the crime did not consume a substantial amount of time. The fact Lindsay was convicted of the 2012 robbery "reduced any prejudicial effect, as the jury would not be tempted to convict [him] of the charged offenses in order to punish him for the previous crime." (*People v. Jones* (2011)

51 Cal.4th 346, 371-372.) Additionally, the circumstances of the prior offense (aiding a group of people in a robbery) "were not particularly inflammatory when compared to" the charged offense. (*People v. Harris* (2013) 57 Cal.4th 804, 842.) Finally, Lindsay testified knowing that he would likely be impeached with this conviction. This further supports the trial court's decision to admit the evidence. (*People v. Clarida* (1987) 197 Cal.App.3d 547, 554 [defendant not deterred from testifying in his own defense by the knowledge that he would be impeached with prior conviction].)

On this record, we cannot say that the trial court acted arbitrarily or exceeded the bounds of reason in impliedly finding that the probative value of the 2012 robbery conviction outweighed its prejudicial potential.

III. ADVISEMENT OF CONSTITUTIONAL RIGHTS

A. *Additional Facts*

The trial court granted Lindsay's in limine motion to bifurcate the trial of his alleged strike priors. Out of the presence of the jury, the trial court asked defense counsel "What are we going to do about the priors. Do you want to talk to him?" Defense counsel discussed the matter with Lindsay and represented to the trial court, "Your honor, I did speak with Mr. Lindsay, and he does waive his right to a jury if it comes down to that." The following colloquy then occurred between the court and Lindsay:

"THE COURT: So, Mr. Lindsay, just to make sure the record is clear, if they find you guilty of robbery, then you have the priors to consider that you've been charged with. Do you understand, that sir?"

"THE DEFENDANT: Yeah.

"THE COURT: And you have the right to have this jury decide beyond a reasonable doubt whether or not you, in fact, have been convicted of these priors. You understand that?"

"Appellant: Yeah.

"THE COURT: And you wish [to] waive that right and have me make that decision; correct?

"THE DEFENDANT: Yes."

After the jury rendered its verdict, the trial court turned to the prior conviction allegations and inquired whether there would be a court trial or admissions. Defense counsel replied "[a]dmissions" and stated that she was ready to proceed. The trial court told Lindsay, "you've already waived your right to a jury trial on these final issues of the priors. It's my understanding that you wish to admit that you have suffered the following priors," at which time Lindsay admitted the three priors listed by the court.

B. *Analysis*

Lindsay contends that his sentence must be reversed because he was not advised of, and did not waive, his right to a jury trial, privilege against self-incrimination, and right to confrontation on the prior conviction allegations. The People assert that Lindsay knowingly waived his right to a jury trial on his prior conviction allegations before admitting them, but concede a failure to advise Lindsay of his privilege against self-incrimination and right to confrontation on the prior conviction allegations. The People claim, however, that the record supports the conclusion that Lindsay knowingly waived both the right to remain silent and the right to confront witnesses despite lack of advisement on either right. We agree with the People.

A criminal defendant's plea of guilty or inculpatory admission requires a personal waiver of three constitutional rights: (1) the privilege against self-incrimination; (2) the right to a trial by jury; and (3) the right to confront one's accusers. (*Boykin v. Alabama*

(1969) 395 U.S. 238, 243 (*Boykin*).) Accordingly, the trial court must advise a defendant of these rights and obtain his or her waiver of each right before taking such a plea or admission. (*In re Tahl* (1969) 1 Cal.3d 122, 132 (*Tahl*); *People v. Mosby* (2004) 33 Cal.4th 353, 359-360 (*Mosby*).) " '[E]ach of the three rights mentioned—self-incrimination, confrontation, and jury trial—must be specifically and expressly enumerated for the benefit of and waived by the accused *prior* to acceptance of his *guilty plea*.' " (*Mosby, supra*, at p. 359.) The *Boykin-Tahl* advisements must be given before the trial court may accept a criminal defendant's admission that he or she has suffered prior felony convictions. (*In re Yurko* (1974) 10 Cal.3d 857, 863.)

The absence of express admonitions and waivers, however, does not require reversal regardless of prejudice. (*Mosby, supra*, 33 Cal.4th at p. 361.) "[I]f the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*Ibid.*; see also *People v. Farwell* (2018) 5 Cal.5th 295, 303-304 (*Farwell*) [totality of the circumstances test applies in all circumstances where the court fails, either partially or completely, to advise and take waivers of the defendant's trial rights before accepting a guilty plea].) "The focus is not on whether a prior would have been found true, but on whether the defendant knew of his constitutional rights." (*People v. Stills* (1994) 29 Cal.App.4th 1766, 1770.)

In *Mosby, supra*, 33 Cal.4th 353, after the jury returned a guilty verdict on the pending charge of selling cocaine, the defendant waived trial on a prior conviction, but not "the concomitant rights to remain silent and to confront adverse witnesses." (*Id.* at p.

356.) The defendant then admitted a prior conviction for drug possession. (*Id.* at p. 359.) Based on the totality of the circumstances, the Supreme Court determined the waiver was knowing and voluntary and affirmed defendant's conviction. (*Id.* at pp. 365-366.)

Mosby, supra, 33 Cal.4th 353, emphasized the differences between a trial on a pending criminal charge and a trial on a prior conviction, noting the latter "is 'simple and straightforward,' often involving only a presentation by the prosecution 'of a certified copy of the prior conviction along with the defendant's photograph [or] fingerprints' and no defense evidence at all. [Citation.] Here, defendant, who was represented by counsel, had just undergone a jury trial at which he did not testify. . . . Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation." (*Id.* at p. 364.)

In this case, the trial court informed Lindsay of his right to a jury trial on his prior conviction allegations. Specifically, the trial court asked defense counsel if she wanted to discuss the prior conviction allegations with Lindsay. Counsel did so and informed the court that Lindsay waived his right to a jury. The trial court then spoke directly with Lindsay, confirmed that Lindsay understood his right to have a jury decide the prior conviction allegations and confirmed that Lindsay wanted to waive that right and have the court decide the issue. Accordingly, this is an "incomplete advisement" case because the court failed to advise Lindsay of his right to remain silent and right to confront adverse witnesses. (*Mosby, supra*, 33 Cal.4th at p. 363.) As we shall explain, we

conclude that the trial court's failure to advise Lindsay about his rights to remain silent and confront witnesses was harmless under the totality of the circumstances.³

At the preliminary hearing, defense counsel told the court that Lindsay had been informed of the charges against him, was advised of his constitutional rights and that he wished to plead not guilty. The trial court then entered a not guilty plea and denied all allegations. Thereafter, the matter was tried to two juries, with Lindsay testifying both times, resulting in two hung juries. After the guilty verdict in the instant trial, Lindsay admitted the prior allegations immediately following his jury trial at which he confronted his accusers.

Lindsay's experience with the criminal justice system is not limited to the charges in the instant case; rather, his probation report shows 12 criminal matters between 2009 and 2013, before he committed the instant offence in 2017. Additionally, his 2012 robbery conviction was the product of a guilty plea that presumably included a waiver of constitutional rights, including the right to confront and cross-examine all the witnesses against him. On this record, we conclude that Lindsay was aware of his right to confront witnesses and waived that right when he admitted the prior conviction allegations.

(*Mosby, supra*, 33 Cal.4th at p. 364 ["[B]ecause [the defendant] had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation."].)

³ Lindsay's reliance on *People v. Cross* (2015) 61 Cal.4th 164 (*Cross*) is misplaced. In *Cross*, the trial court did not give *any* of the three *Boykin-Tahl* advisements before the defendant's stipulation to a prior conviction, which occurred during the prosecutor's examination of the first witness and before the defendant's attorney had conducted any cross-examination. (*Id.* at p. 180.) Additionally, there was "no information on how the alleged prior conviction was obtained." (*Ibid.*) The court in *Cross* held that under those circumstances the defendant's stipulation had to be set aside. (*Ibid.*)

The record also supports the inference that Lindsay knew of, and waived, his constitutional right to remain silent before he admitted the truth of his prior conviction allegations. Lindsay presumably was advised of his right to remain silent when he pleaded guilty on his 2012 robbery conviction. Additionally, Lindsay appeared at the preliminary hearing where defense counsel informed the court that Lindsay had been advised of his constitutional rights.

Although not addressed by the parties, our Supreme Court has established a " 'judicially declared rule of criminal procedure' that an accused, before admitting a prior conviction allegation, must be advised of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of being adjudged a habitual criminal." (*Cross, supra*, 61 Cal.4th at pp. 170-171.) Because the advisement of the penal consequences of admitting a prior conviction is not constitutionally mandated, any error by the trial court in not advising a defendant of the penal consequences of his or her admission of prior conviction allegations "is waived if not raised at or before sentencing." (*People v. Walker* (1991) 54 Cal.3d 1013, 1023, overruled on other grounds as stated in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.) The record shows that Lindsay failed to object either at the time of his admissions or at the time of his sentencing on the specific ground that he was not adequately advised of the penal consequences of the admissions. Thus, we conclude that Lindsay forfeited the error by not objecting below.

IV. PRIOR SERIOUS FELONY CONVICTION ENHANCEMENT

At the time of Lindsay's sentencing, trial courts had no authority to strike or dismiss enhancements proven under section 667, subdivision (a)(1). (*People v. Valencia*

(1989) 207 Cal.App.3d 1042, 1045-1047.) Senate Bill No. 1393 removed this prohibition by amending sections 667, subdivision (a), and 1385 to give trial courts discretion to strike or dismiss a prior serious felony conviction enhancement. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The parties agree that this new law applies retroactively to Lindsay and that the matter should be remanded to give the trial court an opportunity to exercise its discretion pursuant to recently amended sections 667, subdivision (a)(1), and 1385. We agree that a limited remand is appropriate.

DISPOSITION

The matter is remanded with directions to the trial court to decide whether it will exercise its newfound discretion to strike the prior serious felony conviction enhancement under sections 667, subdivision (a), and 1385. We express no opinion on how the trial court should exercise such discretion. In all other respects, the judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

GUERRERO, J.